

Filed 4/26/19 P. v. Sprewell
Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RULIE CHEVEZ SPREWELL,

Defendant and Appellant.

B280027

(Los Angeles County
Super. Ct. No. NA092429)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Meyer, Judge. Affirmed in part, reversed in part, and remanded.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Marc A. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

A Los Angeles County jury convicted defendant and appellant Rulie Sprewell (defendant) on multiple counts of pimping and pandering, and three counts of forced oral copulation. The jury deadlocked on a charge of human trafficking, and the prosecution later dismissed the charge. We previously issued an opinion that we now vacate at our Supreme Court’s direction so as to consider certain additional sentencing issues that arose only after the filing of our prior opinion. All told, we consider (1) whether defendant’s conviction must be reversed because his retained attorney—who defendant unsuccessfully attempted to relieve on the eve of trial because of a payment dispute—provided ineffective assistance of counsel during trial, (2) whether the trial court erred in resentencing defendant, and (3) whether a remand is warranted so the trial court may decide whether it wishes to exercise sentencing discretion recently conferred by statute.

I. BACKGROUND

A. *Initial Proceedings*

The Los Angeles County District Attorney charged defendant in an eight-count information with violations of Penal Code section 236.1, subdivision (a)¹ (human trafficking involving a minor); section 266h, subdivision (b)(1) (pimping a minor over age 16); section 266i, subdivision (b)(1) (pandering by encouraging a minor over age 16); section 288a, subdivision (c)(2)(A) (forcible oral copulation—three counts); section 266h, subdivision (a) (pimping); and section 266i, subdivision (a)(1) (pandering by procuring).

¹ Undesignated statutory references are to the Penal Code.

Defendant was represented by retained counsel at the preliminary hearing on the charges. Later, a bar panel attorney took over defendant's defense. Then, in September 2014, nearly two years after the initiation of criminal proceedings, defendant elected to represent himself after being advised of the dangers and disadvantages of self-representation. Almost a year after that, in August 2015, defendant retained C. Reginald Taylor (Taylor) to represent him and relinquished his self-represented status.

Roughly six months later, when the parties appeared in court the day before trial was to begin, Taylor asked the court to continue the trial. Taylor conceded he had not filed a written motion for a continuance, but he told the court he was not prepared because he had been out of town the past week. The trial court concluded Taylor had not shown good cause, denied the continuance request, and ordered the parties to return the following day for trial.

In court the next morning, defendant asked to speak to the trial court outside the presence of the prosecution. Defendant stated he was "at an impasse" with Taylor because defendant owed Taylor "quite a bit of money." As defendant explained it, Taylor was "not really angry, you know, but it's—it's business . . . so I don't think it would be wise to . . . proceed with him where maybe his . . . mind wouldn't be totally on my case" Defendant asked the court to reappoint counsel. The trial court asked Taylor if he wished to respond, and Taylor replied, "I have nothing to add."

With the prosecutor back in the courtroom, the court advised defendant was requesting reappointment of counsel. The prosecutor objected, arguing the request was untimely and

highlighting all the various changes in counsel that had occurred during the three-plus years the case had been pending. The prosecutor also emphasized she had a material witness in custody who would be prejudiced by continuing the case. The court again invited Taylor to make “any comments you wish to add to the record” and Taylor declined to comment. The trial court then denied defendant’s request for reappointment of counsel and ordered Taylor “to stay on this case and to do this trial.”²

B. Trial

1. Jury selection

Before the parties began jury selection, defendant asked the court to move him “into custody in the back” of the courthouse, explaining he did not “agree with any of this” and was “not going to be peaceful in here.” The court informed defendant he was welcome to stay in the courtroom and told defendant that if he wanted to “go into the back” that was up to him.

Defendant made no election, and the prospective jurors entered the courtroom. At that point, defendant exclaimed: “Get me out of here. Lies and—and bullshit— [¶] . . . [¶] A bunch of lies and stuff. Believe all these lies. That’s why I don’t want to

² After the court denied defendant’s request for reappointment of counsel, defendant asked to reassert his right to represent himself. The court asked defendant if he was ready for trial, and defendant said he was not. The court denied the self-representation request as untimely, and defendant does not challenge this ruling.

be part of this because they're lying and—and railroading people here. This is a railroad system. You people should wake up and see it for what's going on.” Following this outburst, defendant was escorted out of the courtroom and jury selection proceeded.³

During voir dire, the trial court examined the prospective jurors, partly through the use of a short juror questionnaire, and allotted 10-15 minutes (per each group of jurors examined) for counsel to ask questions if either side so chose. The prosecution elected to ask questions of the prospective jurors. Taylor did not, but he raised several objections to certain questions and statements by the prosecution and the court concerning his client's absence from the courtroom (the objections were overruled). When it came time to challenge jurors, for cause and peremptorily, Taylor raised multiple for-cause challenges and exercised ten peremptory strikes.⁴

Before the jury was impaneled, and outside the presence of the prospective jurors, the trial court asked Taylor if he would like to move to bifurcate trial as to the prior convictions alleged against defendant. Taylor responded, “Not at this time, Your Honor.” The court asked Taylor, “Why would you not make a

³ On two occasions during the ensuing voir dire of the prospective jurors, Taylor and the court's bailiff spoke to defendant and he confirmed he did not want to be present.

⁴ During later post-trial proceedings, the trial court remarked Taylor “did not take a single note during the entire trial, nor during jury voir dire” The court, however, also observed Taylor's performance during jury selection indicated he was able to recall what the various individual jurors said “almost with a photographic memory.”

motion for bifurcation?” Taylor responded, “I’m not making any comments at this time.” This response triggered an admonishment from the court, warning Taylor the court could start contempt proceedings if it felt he was willfully violating or neglecting his duty to his client. Taylor then made a motion to bifurcate the trial, which the court granted.

Defendant returned to the courtroom before opening statements (the prosecution made a statement; Taylor reserved) and continued to be present for the remainder of the trial.

2. *The evidence of crimes against P.D.*

a. *P.D.’s testimony*

At the outset of P.D.’s testimony, she confirmed she worked as a prostitute “a long time ago” but professed to have a lack of memory when asked for various specifics, including her age at the time.⁵ The prosecution confronted P.D. with a handwritten statement, bearing an August 2010 date, that she authenticated as her own. P.D. reviewed what she wrote and acknowledged it was true, but she stated she could not remember what happened to her in 2010 without looking at the statement. Over Taylor’s multiple objections, the trial court permitted the prosecution to read P.D.’s written statement to the jury.

According to P.D.’s statement, she met a man named “Bossy Ross” (whom P.D. later identified in court as defendant)

⁵ The prosecution, for instance, asked whether P.D. remembered “jumping into a car, asking a man for help, and that man turning out to be a police officer.” Taylor objected to the question as leading, the objection was overruled, and P.D. answered “no.”

when she was 15 or 16 years old. They became friends, and defendant asked her to work for him as a prostitute but she refused. A couple of weeks after she turned 18, however, another prostitute working for defendant asked P.D. to come home with her and she agreed. P.D. worked for defendant as a prostitute thereafter, and he instructed her on how much to charge for various sex acts. P.D.'s statement identified the location where she and defendant lived at the time and the type of car defendant drove. The statement also described defendant's violent behavior toward P.D. including on the day she wrote the statement: "[Defendant] always pushed and shoved me so he wouldn't have to hit me in my face, but early this morning around 1:30 a.m., he swung, and I put my arm up so he wouldn't hit my face. I was tryin' [to] block him from hitting . . . my face because he already gave me marks on my arm, and he been doing this since he found out I was pregnant."

During the remainder of the prosecution's direct examination after being confronted with her written statement, P.D. confirmed she engaged in sex acts for money and gave the money she made to defendant because "he was [her] pimp" and she "had to." She also provided additional details concerning her work for defendant as a prostitute, including where and when she would solicit customers. P.D. also confirmed that on the date she wrote her statement in August 2010, she got into a car, asked the man driving for help, and the man turned out to be a police officer. P.D. testified the officer took her to a police station, and a

short time later, P.D. identified defendant in a “six-pack” photographic lineup.⁶

Taylor made various objections during the prosecution’s direct examination of P.D., some of which were sustained and others overruled. When invited to cross-examine P.D., Taylor declined, telling the trial court he had no questions for the witness.

b. police officer testimony

Michael Klee, the undercover Los Angeles Police Department officer whom P.D. asked for help, also testified at trial. He told the jury P.D. approached his unmarked car one early morning in August 2010 and, while crying, told him she needed to get out of the area because her pimp had just hit her because she was four months pregnant. P.D. got into Officer Klee’s car, and Klee initially thought P.D. might just be attempting to get a free car ride. P.D. seemed adamant about getting defendant arrested, however, so Klee identified himself as a police officer and asked P.D. where her pimp was. P.D. identified defendant’s car in a nearby 7-Eleven parking lot,⁷ and he was arrested. A subsequent search of defendant’s vehicle turned up women’s clothing and condoms.

⁶ The photographic lineup police showed to P.D.—bearing her identification of defendant as the person who made her commit sex acts for money—was admitted as an exhibit at trial.

⁷ Officer Klee testified that when P.D. identified defendant’s car, she told him (Officer Klee) that if defendant found her he would kill her. As discussed *post*, defendant contends Taylor was constitutionally ineffective in part because he did not object to this testimony as hearsay.

Taylor cross-examined Officer Klee. He first asked questions in an attempt to elicit testimony that the district attorney's office initially refused to file charges against defendant due to witness credibility issues. The prosecution objected and the trial court sustained the objection and directed Taylor not to further inquire on that topic. Cross-examination resumed, and Taylor asked questions (1) to establish Officer Klee saw no marks or bruises on P.D. that would corroborate her account of having been hit, and (2) to emphasize Officer Klee's testimony that he initially thought P.D. might simply have been trying to get a free ride, which was something that Officer Klee agreed "happens" when working undercover to investigate prostitution.

3. *The evidence of crimes against V.R.*

a. *V.R.'s testimony*

Another young woman, V.R., also testified as a prosecution witness. She first worked as an underage prostitute for another pimp, but when she was 16 years old, defendant approached her outside of a McDonald's. V.R. recognized him as "Bossy Ross" based on his reputation on the streets and because she recognized the car he was driving. Defendant asked V.R. if she wanted to work for him as a prostitute, and she agreed and got in his car. V.R. explained she felt scared and "forced" to get in defendant's car because of "the aggression in his tone" of voice.

Defendant drove V.R. to a street corner, and she got out of the car at his direction and stood on the corner trying to "catch a date" (which V.R. defined as "do[ing] an exchange for sex and money"). V.R. did so because she was scared defendant would beat her if she refused.

After that day, V.R. worked as a prostitute for defendant for three months. Defendant determined how much V.R. charged for certain sex acts, the hours she worked every day, and where she worked to solicit customers. Each time V.R. made money from performing a particular sex act, V.R. gave the money to defendant immediately and kept none for herself. V.R. had a “quota” or “trap,” meaning a set amount of money she was supposed to make each day, and defendant hit V.R. in the face with either an open or closed hand if she did not meet her quotas.

During the three months V.R. worked for defendant in 2011, she also engaged in sex acts with defendant at his insistence. She testified she orally copulated defendant more than once per week while she was with him. V.R. was afraid defendant would hit her if she refused to comply with his demands for sex.

V.R. ceased working for defendant when she was arrested by the police. While in custody, she provided information to law enforcement about defendant and her experience with him. Investigating officers drove V.R. to one of the motels where she said she stayed with defendant, and upon arriving, V.R. identified defendant’s green Mercedes in the parking lot. Police officers also showed V.R. a photographic lineup and she circled defendant’s picture to indicate he was the “Bossy Ross” for whom she worked as a prostitute.

During the prosecution’s direct examination of V.R., Taylor made over 30 objections, many of which were sustained. Taylor also cross-examined V.R. at significant length, focusing mainly on V.R.’s year-plus work for her prior pimp, the initial meeting between V.R. and defendant at McDonald’s (including why she felt forced to go with defendant despite being outside in a public

area), and whether V.R. was “on automatic,” meaning engaging in prostitution without compulsion from a pimp.

b. police officer testimony

Long Beach Police Department Detective Satwan Johnson testified as an expert on human trafficking and prostitution; he also described his interactions with V.R. after she was arrested. Detective Johnson interviewed V.R. at juvenile hall, and she described her history with defendant and with the pimp she worked for previously. He later took V.R. out of juvenile hall and drove her around in an attempt to identify locations where she worked and the motel where she stayed with defendant. Detective Johnson confirmed V.R. identified the motel where she and defendant stayed, as well as defendant’s car, which happened to be parked at the motel at the time. The detective spoke to the motel’s clerk and obtained copies of the motel registration card and driver’s license associated with that car, both of which were in defendant’s name and introduced in evidence at trial.

Taylor cross-examined Detective Johnson. He elicited testimony that there were two motel clerks on duty and a phone in the clerks’ office (presumably to establish V.R. could have sought help while staying at the motel). Taylor also asked questions, invoking the detective’s training and experience, to establish both that it was not unusual for prostitutes to ask customers for help (again, presumably to establish V.R. could have left defendant if she wanted to) and that V.R. was “already indoctrinated in the game” by the time she met defendant.

4. *Taylor's closing argument and the jury's verdicts*

At the close of all the evidence (there was no defense case), Taylor made a motion to dismiss several of the charges against defendant pursuant to section 1118.1. The trial court denied the motion. The attorneys and the trial court conferred concerning jury instructions, and the trial proceeded to closing argument.

Taylor began his closing argument with a rather long recitation of dialog from a scene in *The Godfather*, one where a man whose daughter is beaten asks Don Corleone for “justice” beyond the criminal sentence imposed on the culprits and Don Corleone refuses. Taylor told the jury that the prosecution of defendant was similar; the prosecution was seeking punishment beyond that called for by defendant’s actions.

Taylor conceded defendant had pimped both women. He told the jury: “I’m not going to come in here and insult your intelligence and say, ‘This man is not a pimp.’ [¶] He’s a pimp. It’s what he does. That’s how he earns his money. He’s charged with pimping. He’s charged with pandering. And as [the prosecutor] mentioned, I didn’t ask questions—any questions about that because he’s a pimp. That’s what he does.” Taylor also stated defendant “maybe” or “probably” forced V.R. to orally copulate him.

But Taylor argued the “number of crimes” charged by the prosecution against defendant was “too much” and “government excess.” Taylor argued the testimony concerning the oral copulation charges was unclear and the prosecution was inviting the jury to “speculate” it occurred three separate times over three months to support the “wide net in the way it’s charged” (i.e., as three separate counts rather than just one charge). And Taylor

specifically attacked the prosecution's case on the human trafficking charge, contending the jury should go through the elements carefully because defendant had not deprived V.R. of her liberty and charging him with human trafficking was "going too far." Taylor acknowledged defendant was not a "socially-honorable person" but emphasized: "[D]espite the fact that we might not like him or not like what he does, we're looking for justice. We don't . . . want to exceed the bounds."⁸

The jury found defendant guilty on the charges of pimping (counts two and seven), pandering (counts three and eight), and forced oral copulation (counts four through six).⁹ The jury, however, was unable to reach a verdict on count one, the human trafficking charge (with the jurors divided ten to two in favor of guilt), and the prosecution later dismissed the charge. The trial court found true a prior conviction alleged to come within the

⁸ Immediately after the attorneys completed closing argument and the jury left the courtroom to deliberate, the trial court remarked: "I just want to say thank you to the attorneys. I was exceptionally impressed by both of you throughout this trial, and exceptionally impressed by the closing arguments by both sides, for whatever that's worth."

⁹ Prior to delivering their verdicts, the jurors sent two questions to the trial court, both of which corresponded to points made during the defense closing argument. The first asked "why is it a[n oral copulation] count for each month [rather than] . . . for each act," and the second asked what verdict the jury should return on the human trafficking count if all the jurors could not agree whether defendant deprived V.R. of her personal liberty. The court answered the questions after consulting counsel for both sides.

meaning of both the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1).

C. Motion for New Trial Arguing Ineffective Assistance of Counsel

Immediately after the prior conviction trial, the trial court relieved Taylor and granted defendant's request to again represent himself. The court designated the same bar panel attorney defendant had previously as standby counsel, and eventually, defendant relinquished his self-represented status and the court appointed standby counsel to take over as counsel of record.

Prior to sentencing, appointed counsel filed a motion for new trial. Among other arguments, the motion contended Taylor provided constitutionally deficient assistance during trial. Appointed counsel and defendant submitted declarations with the new trial motion contending Taylor was ineffective, among other reasons, for failing to personally voir dire the prospective jurors, declining to question P.D., apparently opting not to take notes during trial, and conceding defendant's guilt on some of the charges during closing argument. No declaration from Taylor was submitted with the new trial motion.

The trial court denied defendant's motion for new trial. As to the ineffective assistance of counsel claim, the court acknowledged it had to have a "strong, stern conversation with [Taylor] about ineffective assistance of counsel" at the outset in connection with his initial failure to make a motion to bifurcate trial, but Taylor ultimately made the motion and the court concluded his performance thereafter did not fall beneath constitutional standards. As to jury selection, for example, the

trial court noted it “give[s] a pretty thorough voir dire” and the prosecution’s voir dire was “extremely thorough,” such that Taylor may have reasonably concluded he did not need to do any additional voir dire.¹⁰ As to Taylor’s decisions in questioning witnesses and delivering closing argument, the court believed Taylor made reasonable tactical decisions and “pick[ed] his battles” because the victims were “very credible” and the “evidence was overwhelming.” With regard to closing argument in particular, the court opined that “sometimes a very strong tactical decision is you’ve got to concede some things” and Taylor “made a very strong tactical decision—one that I think is difficult to do as a defense attorney, but I think it is one that I thought actually was an appropriate tactic in this case”

¹⁰ The court elaborated: “What I’ve also found—again, the record can’t reflect this, but it was something that I noticed distinctly during this trial—because you’re right . . . all throughout this trial, in the back of my mind, is ineffective assistance of counsel. [¶] There’s a difference between ineffective assistance and maybe just not hiring the best attorney in the world. So in my mind, I won’t deny I was concerned, and you’re right, I did not see—and [defendant] is right in his declaration . . . Taylor [did not] write any notes, and I found that concerning and disturbing. [¶] However, I also found, very interesting, that when he asked to approach for cause, that he could recite—almost with a photographic memory—everything that juror had said, and I was surprised by that. And it was something that I realized—at least in my mind—based on observations and although the record doesn’t show it—he was clearly listening to each juror and knew everything about them. [¶] Hard to reflect in a record, distinctly an observation of this court, one I wouldn’t share or put part of this record if I didn’t sincerely feel that.”

The trial court sentenced defendant to 58 years and four months in prison. The sentence was comprised of a high term of 16 years each, consecutive, for the three forced oral copulation convictions (as the result of doubling pursuant to the Three Strikes law), plus two midterm consecutive sentences of two years and eight months for each of the pimping convictions, plus two midterm concurrent sentences of eight years for the pandering charges, plus five years for the section 667, subdivision (a)(1) prior conviction allegation.

*D. Defendant's Resentencing*¹¹

Coming to the view that it had imposed an unauthorized sentence in two respects, the trial court set a resentencing hearing. Specifically, in the first respect, the trial court believed it “should have done a principal subordinate calculation and not just run everything subordinate”; in other words, the court believed the holding in *People v. Pelayo* (1999) 69 Cal.App.4th 115 (*Pelayo*) required the court to calculate the sentence for defendant’s violent sex offense convictions (the forcible oral

¹¹ After we issued our initial opinion, defendant’s appellate attorney discovered that the trial court held further proceedings to resentence defendant, and that the further proceedings had not been included in the appellate record. Defendant alerted our Supreme Court to the problems with the record in his petition for review, and the Supreme Court granted the petition with directions to vacate our prior opinion and to reconsider the cause “in light of Senate Bill No. 1393 (Stats. 2018, Ch. 1013) and for such further proceedings as [we] deem[] appropriate.” On remand from the Supreme Court, we ordered the appellate record augmented to include the resentencing proceedings.

copulation crimes) completely separately from the other counts of conviction, rather than treating the latter as subordinate to the former. The court also concluded it should have added a five-year prior serious felony conviction enhancement for each of the forcible oral copulation charges.

At the resentencing hearing, after hearing argument from counsel, the trial court sentenced defendant to an aggregate of 73 years and eight months, comprised of 21 years (the upper term of 16 years plus a five-year prior serious felony conviction enhancement) on each of the three forcible oral copulation convictions; a consecutive eight years for the pimping a minor over age 16 conviction (treated as the principal term pursuant to section 1170.1); and a consecutive two years and eight months for the pimping (§ 266h, subd. (a)) conviction (treated as the subordinate section 1170.1 term and calculated at one-third the midterm doubled).¹² The court also sentenced defendant to eight years, concurrent, as to each of the pandering-related convictions.

¹² This reflects our best effort to understand the sentence as orally pronounced. At sentencing, the court's pronounced sentences on each count ordered to run consecutively totaled the aforementioned 73 years, eight months, but the trial court stated—in an apparent mathematical error—that the aggregate sentence was 79 years and eight months. The minute order prepared for the sentencing hearing, on the other hand, states the court imposed an aggregate sentence of 78 years and eight months (apparently including a fourth five-year prior serious felony conviction enhancement). The abstract of judgment has yet another calculation, 78 years and four months, that correctly lists each sentence on each individual count but incorrectly adds each count to arrive at four rather than eight months.

II. DISCUSSION

Defendant's sole challenge to the validity of his convictions is the claim that Taylor provided ineffective assistance of counsel during trial. Defendant does not challenge the trial court's ruling on the motion for new trial per se; rather, he presents the claim as a freestanding argument for reversal. We apply the well-established framework for evaluating such an ineffective assistance claim on direct appeal and conclude defendant's arguments fail under that governing standard.

Specifically, defendant challenges four aspects of Taylor's performance at trial. He states Taylor was ineffective for (1) failing to take notes or question prospective jurors during jury selection; (2) opting not to cross-examine P.D., nor to object to related hearsay testimony given by Officer Klee; (3) conceding defendant's guilt on some of the charges during closing argument; and (4) being discourteous during trial, or as defendant puts it, engaging in "misconduct." For reasons we shall describe,¹³ we believe there could be valid tactical reasons for all or nearly all of these identified actions or omissions, and that conclusion is fatal to a claim of ineffective assistance of counsel raised on direct appeal. Furthermore, for many of these specific claims, defendant makes no showing of how he was prejudiced by counsel's performance, or raises at most a generalized assertion of prejudice. That too is reason to reject his appellate contentions.

¹³ By organizational imperative, we discuss these points individually. The result we reach, however, accounts for their collective impact at trial.

As for defendant's claims regarding the sentence imposed at the resentencing hearing, a remand for another resentencing is required. The trial court was correct that its initial sentence was unauthorized under *Pelayo*, and it correctly calculated the sentence for the forced oral copulation offenses entirely separate from the other counts of conviction. The trial court also correctly understood, contrary to defendant's suggestion otherwise, it had discretion to sentence at the low, middle, or high term upon resentencing. But defendant is correct in arguing the trial court appears to have imposed one too many five-year prior serious felony conviction enhancements (§ 667, subd. (a)(1)), and a remand is in any event required, as the Attorney General concedes, so the trial court may determine whether it wishes to exercise newly conferred discretion to decide whether to re-impose any or all of the prior serious felony conviction enhancements. In view of the sentence calculation difficulties revealed by the record, we shall remand for resentencing and for the preparation of a corrected abstract of judgment, which the trial court must personally supervise.

A. *Defendant's Challenge to His Convictions*

1. *The law governing ineffective assistance of counsel claims on direct appeal*

“In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694[]; *People v. Ledesma* (1987) 43 Cal.3d

171, 217[.]” (*People v. Carter* (2005) 36 Cal.4th 1114, 1189 (*Carter*).) We presume “counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.]” (*Ibid.*)

Here, no declaration from Taylor accompanied defendant’s motion for new trial. We are thus left with a record identical to the records we often find in cases raising ineffective assistance of counsel arguments on direct appeal—one that does not reveal why trial counsel pursued certain courses of action and not others. Under these circumstances, it is “particularly difficult” for a defendant to prevail on an ineffective assistance of counsel claim. (*People v. Scott* (1997) 15 Cal.4th 1188, 1212; see also *People v. Mickel* (2016) 2 Cal.5th 181, 198 [when the record on appeal does not explain why counsel chose to act as he or she did, “a reviewing court has no basis on which to determine whether counsel had a legitimate reason for making a particular decision, or whether counsel’s actions or failure to take certain actions were objectively unreasonable”]; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268.) That is to say, “an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.” [Citation.]” (*Carter, supra*, 36 Cal.4th at p. 1189.) Furthermore, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed.” (*Strickland v. Washington, supra*, 466 U.S. at p. 697.)

2. *Jury selection*

Taylor asked no questions of the prospective jurors, and all indications are he took no notes during jury selection. He did, however, challenge several potential jurors for cause and exercise peremptory challenges. In doing so, as the trial court put it, he was able to recite “almost with a photographic memory” what the various jurors said. And as the trial court emphasized in ruling on defendant’s new trial motion, the examination of the prospective jurors—albeit without a contribution from Taylor—was thorough.

We need not analyze whether there could be no satisfactory explanation for Taylor’s limited participation in jury selection because defendant has not carried his burden to demonstrate *Strickland v. Washington* prejudice. Defendant identifies no prospective juror who was chosen to serve on the jury, who Taylor did not challenge, but who would have been excluded, or at least challenged, by competent counsel. Rather, defendant offers only the generalized complaint that “problems were evident . . . even before the trial started with jury selection,” coupled with a quasi-concession that “[i]t is impossible to state with certainty what the outcome of the trial would have been if defense counsel had properly prepared for and presented the case.” This is insufficient.¹⁴ (See *People v. Lucas* (1995) 12 Cal.4th 415, 480 [holding, even in a case unlike this one where the defense *had* identified a particular juror of concern, that “the decision

¹⁴ Defendant’s citation to *People v. McGraw* (1981) 119 Cal.App.3d 582 is unavailing. The attorney in that case was completely absent during voir dire and “did not even appear pro forma.” (*Id.* at p. 595.)

whether to accept a jury as constituted is obviously tactical, and nothing on the appellate record demonstrates counsel's tactical choice here was either unreasonable or prejudicial"] (*Lucas*).)

3. *Cross-examination of P.D. and the absence of a hearsay objection*

Taylor did not cross-examine P.D., but he did raise objections on various grounds during her direct examination. Reviewing the record on appeal, we cannot say Taylor's decision to forego cross-examination of P.D. is without conceivable tactical justification. Indeed, we can conceive of at least two reasons that would permissibly explain Taylor's choice.

First, P.D. was a reluctant witness at the outset of her testimony and she professed to be unable to remember many details of her interaction with defendant. However, after being confronted with her written statement and as the direct examination wore on, P.D.'s memory improved and her testimony became more damaging to the defense. Taylor may have reasonably thought, under the circumstances, that P.D.'s testimony would have become even more incriminating the longer she was on the witness stand, even if on cross-examination.

Second, Taylor may have determined before or during trial that the prosecution's evidence of pimping and pandering was quite strong (recall the trial court described the victims as "very credible" and the evidence as "overwhelming"). Consistent with his approach later during closing argument, Taylor may have concluded it made strategic sense to focus the defense solely on the oral copulation and human trafficking charges—both of which pertained to V.R., not P.D. This is a determination that is within the realm of reasonable tactical choices for an attorney to make,

and in that light, cross-examining P.D. would have presented little, if any, anticipated benefit but significant risk (i.e., alienating jurors with an unnecessary attack on an alleged victim). We accordingly cannot say Taylor’s decision to forego cross-examination is tactically unjustifiable.

In a related vein, defendant further protests Taylor was deficient for failing to object to certain hearsay testimony by Officer Klee, including the officer’s testimony that P.D. told him defendant “would kill her” if he found her. That statement may well have been admissible because it explained P.D.’s reluctance to testify. But even assuming for argument’s sake that Taylor could have no reasonable explanation for opting not to object to hearsay testimony by Officer Klee (but see *People v. Williams* (1997) 16 Cal.4th 153, 215 [“[w]hether to object to inadmissible evidence is a tactical decision . . . [and] failure to object seldom establishes counsel’s incompetence”]), defendant still makes no attempt to show how any such testimony could be prejudicial. In light of P.D.’s own testimony—describing how she feared defendant in light of his violent behavior toward her—we see no reasonable probability that any hearsay testimony influenced the jury’s verdict.

4. *Closing argument*

“[R]eversals for ineffective assistance of counsel during closing argument rarely occur; when they do, it is due to an argument against the client which concedes guilt, withdraws a crucial defense, or relies on an illegal defense.” (*People v. Williams, supra*, 16 Cal.4th at p. 265.) This case involves the former of these circumstances: Taylor outright conceded defendant’s guilt on the pimping and pandering charges, and he

told the jury defendant “probably” committed an act of forced oral copulation while challenging the jury to reject the prosecution’s decision to bring three separate oral copulation charges. On the record before us, we cannot say Taylor could have had no rational tactical purpose for making the concessions he did.

“Defense counsel must not argue against his or her client [citation], but it is settled that it is not necessarily incompetent for an attorney to concede his or her client’s guilt of a particular offense.” (*Lucas, supra*, 12 Cal.4th at p. 446; accord, *People v. Gurule* (2002) 28 Cal.4th 557, 611-612.) Where the incriminating evidence is strong and defense counsel offers some other choice in a defendant’s favor, our Supreme Court has repeatedly rejected claims of ineffective assistance of counsel. (See, e.g., *People v. Hart* (1999) 20 Cal.4th 546, 630-631 [citing cases] (*Hart*); *People v. Freeman* (1994) 8 Cal.4th 450, 498 [“Recognizing the importance of maintaining credibility before the jury, we have repeatedly rejected claims that counsel was ineffective in conceding various degrees of guilt”].)

That is the circumstance here. The prosecution’s evidence—credible victim testimony corroborated by officer testimony and exhibits—was strong. Taylor might have decided his best hope of achieving a favorable result for his client was to give ground on the pimping and pandering charges but stand fast on the more serious human trafficking charge and the multiple charged violations of the forced oral copulation statute. This strikes us as a reasonable tactical judgment, and indeed, it appears to have succeeded when considering the questions the jury asked during deliberations and (to a lesser degree) the verdicts it returned, which ultimately led to the dismissal of the most serious human trafficking charge.

We are unpersuaded by defendant’s suggestion that Taylor conceded too much in light of penalties his client faced under the charged statutes. Human trafficking, under former section 236.1, called for a four, six, or eight year prison sentence, as well as a possible \$100,000 fine. (Former § 236.1, subds. (c), (g) (2010).) The oral copulation charges were punishable by three, six, or eight years in prison (Former § 288a, subd. (c)(2)(A)), and the pimping and pandering charges were punishable by three, four, or six years (§§ 266h, subd. (b)(1), 266i, subd. (b)(1)). By contesting the human trafficking charge and the decision to charge multiple violations of former section 288a, defendant would have faced a drastically reduced sentence had the jury fully adopted the defense position—especially in light of the possibility the trial court would impose concurrent rather than consecutive sentences. Thus, for purposes of the record before us, the *Hart* court’s conclusion is apposite: “Counsel’s decision to acknowledge defendant’s culpability—but to a lesser extent than that urged by the prosecution, in an effort to spare his client from [greater punishment]—was not a tactical choice that could not be satisfactorily explained. No deficiency appears.”¹⁵ (*Hart, supra*, 20 Cal.4th at pp. 631-632.)

5. *Taylor’s discourtesy during trial*

a. *additional background*

On a handful of occasions during trial, most outside the presence of the jury, Taylor was discourteous and sometimes

¹⁵ A recent decision in a capital case, *McCoy v. Louisiana* (2018) ___ U.S. ___ [138 S.Ct. 1500, 1505], does not aid defendant’s ineffective assistance of counsel claim on this record.

outright rude to the trial judge. We highlight those occasions we have not already mentioned, proceeding chronologically in the order they occurred during trial.

During Taylor's cross-examination of Officer Klee, he asked a question apparently intended to reveal the case against defendant was originally rejected by the district attorney's office. The following exchange ensued between the court and Taylor at sidebar:

The Court: All right. Is that where you want to go with this?

Mr. Taylor: It's a question.

The Court: Huh?

Mr. Taylor: It's just a question.

The Court: Is that a "yes" to my question?

Mr. Taylor: I don't know where I'm going.

The Court: Well then, it's not relevant, so sustained.

Later, when Taylor was cross-examining V.R., there was further back and forth between Taylor and the trial court, this time in the presence of the jury:

Q. [to V.R. by Taylor]: But you never met this individual before, . . . and you just did what he told you to do. You just got into his car, he dropped you off on the corner, you stood there for an hour and a half, didn't try to leave, didn't have any interactions with any other people?

The Court: All right. Counsel, if there's actually a question in there, that would be great.

Mr. Taylor: That was a question.

The Court: No, that wasn't.

Mr. Taylor: That was—

The Court: That was a dissertation.

Mr. Taylor: Oh, it was? [¶] May I take a—
may I have a recess?

The Court: No, sir.

Mr. Taylor: Okay. Are you going to help me
along like you helped [the prosecutor] along with her
questions or can I—can I conduct my cross-
examination?

The Court: Please do so, sir.

Just moments later, the court reporter stated she could not
understand what Taylor was saying:

Q. [by Taylor]: Okay. So you—you started
prostitution for a year and a half prior to—

The reporter: Excuse me. I—

The Court: Counsel—

The reporter: —I can't understand him.

The Court: All right. Now, you can be rude to
me, and I'll suck it up, but you cannot be rude to my
court reporter. If she interrupts you, you stop.

Mr. Taylor: Thank you, Your Honor.

The Court: Please rephrase your question
slower.

Q. By Mr. Taylor: You—began—prostitution—
or—working—as—a—prostitute—approximately—
a—year—and—a—half—before—you—encountered—
an—individual—at—McDonald's; correct?

Shortly thereafter, the trial court asked both attorneys to
step into the hallway outside the courtroom and said the
following:

The Court: I understand, Mr. Taylor, you don't want to be doing this case, and I get you're not being paid, but decorum has to be maintained. I have been forgiving you of being late every single appearance because I've heard through another judge that things are going on and how far you live; but quite frankly, I could have imposed sanctions anywhere along the way, but I'm trying to just be nice as pie, so everybody can get this case along.

You want to lodge an objection or lodge an appeal to a ruling of mine, you go ahead, but if you're snotty to me one more time in court, I'm going to sanction you.

Now, as far as the witness is concerned and everything goes, I cannot have any more interruptions. All I'm trying to do is keep a record, and you rolling your eyes at me and stuff like that in court is getting old, so I'm going to tell you right now, you are now on notice, so knock it off with being rude.

Thank you.

b. analysis

There is no reason to think the jury would have returned a more favorable verdict absent discourteous exchanges between Taylor and the trial court that the jury did not hear or see. Thus, we focus on the one instance of discourtesy identified by defendant that occurred in the presence of the jury: the above-quoted back and forth in which Taylor suggested the trial court was assisting the prosecution and then apparently acted in a rude manner toward the court reporter.

We are not convinced there could be no valid tactical reason for Taylor's behavior. At the outset of jury selection, defendant exclaimed the case against him was a "bunch of lies and stuff" and the court proceedings were "a railroad system." Stuck with his client's decision to engage in such an outburst, Taylor may have reasonably concluded he had no choice but to play the hand his client dealt him by (improperly) attempting to garner sympathy and suggest in the presence of the jury that the trial judge was unjustifiably favoring the prosecution. Regardless, even if it were true there could be no tactical reason for Taylor's discourtesy, there is still no reasonable probability, in light of the strength of the evidence against defendant and his own in-court behavior, that this single extended exchange between the court and Taylor is what caused the jury to refrain from returning a more favorable verdict.

At bottom, this is not a case like those defendant cites: *People v. Shelley* (1984) 156 Cal.App.3d 521 (*Shelley*) and *People v. McKenzie* (1983) 34 Cal.3d 616 (*McKenzie*). Both of those cases involved attorneys who refused to participate in trial apart from sitting next to their clients at counsel table. (*Shelley, supra*, at p. 524 [after receiving adverse rulings, counsel stated he would not "raise any objections, cross-examine witnesses, discuss instructions, argue or present a defense or participate in any way other than being physically present in the trial"]; *McKenzie, supra*, at p. 625 [defense counsel "flatly refused to participate in the trial beyond appearing in court and sitting next to his client"].) Here, Taylor's behavior during trial was occasionally petulant, and that is lamentable. But overall, the record before us demonstrates he was an active trial participant and his discourtesy neither impaired constitutionally adequate

performance nor provides reason to believe the jury punished defendant for Taylor's behavior.

B. Resentencing Issues

1. The initial sentence was unauthorized and the trial court properly understood its obligations under section 667.6 at resentencing

“Section 1170.1 provides the general formula for determining consecutive terms of imprisonment for persons convicted of two or more felonies. A principal term is selected and subordinate terms and enhancements are added to it to produce an aggregate term of imprisonment. The principal term consists of the greatest term of imprisonment imposed for any of the convictions. Subordinate terms for non-violent felonies are one-third of the middle term for each felony, not to exceed five years; for violent felonies, it is one-third of the middle term plus one-third of all enhancements. For a violation of listed sex crimes, the number of enhancements that may be imposed is unlimited.” (*Pelayo, supra*, 69 Cal.App.4th at p. 123.)

“Violent sex crimes[, however,] are treated differently. The Legislature enacted section 667.6 in 1979 to significantly increase prison terms for persons convicted of certain violent sex offenses. (Stats. 1979, § 10, p. 3258.) Section 667.6, subdivisions (c) and (d) address[] the terms of imprisonment for 10 listed sex crimes commonly referred to as ‘violent sex crimes’” (*Pelayo, supra*, 69 Cal.App.4th at p. 123), including forcible oral copulation, the crimes charged against defendant in counts four through six. (§ 667.6, subd. (e)(7).)

As relevant for our purposes, section 667.6, subdivision (d) provides: “A full, separate, and consecutive term shall be

imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. [¶] . . . [¶] The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1.” The *Pelayo* decision summarizes the upshot of section 667.6, subdivision (d), particularly the final quoted sentence that is key for our purposes: “[T]he term imposed under section 667.6, subdivision (d) ‘shall not be included in any determination pursuant to Section 1170.1.’ Thus, when a defendant is convicted of both violent sex offenses and crimes to which section 1170.1 applies, the sentences for the violent sex offenses must be calculated separately and then added to the terms for the other offenses as calculated under section 1170.1.” (*Pelayo, supra*, 69 Cal.App.4th at p. 124 [holding the trial court there “erred by making both non-violent sex offenses subordinate counts and thereby effectively merging one of the section 667.6 offenses into a section 1170.1 term”].)

Defendant urges us not to follow the analysis in *Pelayo*, but we find the *Pelayo* court’s understanding of the statutory scheme unassailable. That defendant cites a case, *People v. Cadogan* (2009) 173 Cal.App.4th 1502 (*Cadogan*), where the sentence as modified by the Court of Appeal is arguably in tension with *Pelayo* is of no moment. The precise question concerning the meaning of section 667.6, subdivision (d) was not presented in *Cadogan* (*id.* at p. 1516 [relying on subdivision (c) of section 667.6]) and cases are not authority for propositions not

considered (*People v. Brown* (2012) 54 Cal.4th 314, 330).¹⁶ Furthermore, to the extent *Cadogan* and *Pelayo* can be said to conflict, we are convinced *Pelayo* represents the better view. The trial court was therefore correct to conclude its initial sentence was unauthorized. The trial court also correctly understood its obligation, at resentencing, to impose sentence on the forced oral copulation counts of conviction completely separately, and to add the sentence on those counts to the sentence imposed following a principal-subordinate sentencing calculation performed independently under section 1170.1 for defendant's remaining convictions.

Defendant further advances a passing argument that the trial court was supposedly unaware of its discretion to impose something other than a high-term sentence for the forced oral copulation convictions. The argument is legally unsound. (See, e.g., Evid. Code, § 664; *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1178-1179 [general rule that a trial court is presumed to have been aware of and followed applicable law applies to sentencing issues].) It is also factually meritless: at the resentencing hearing the trial judge stated she “expressed already the reasons why I was choosing [the] high term” at the

¹⁶ The same is true of *People v. Belmontes* (1983) 34 Cal.3d 335 (*Belmontes*), another case cited by defendant. *Belmontes* involved a question of interpretation regarding sentencing under section 667.6, subdivision (c), not subdivision (d). (*Id.* at p. 345.) Subdivision (c)'s language is discretionary, whereas subdivision (d)'s language is mandatory. (Compare § 667.6, subd. (d) [“A . . . consecutive term shall be imposed”] with § 667.6, subd. (c) [“In lieu of the term provided in Section 1170.1, a . . . consecutive term may be imposed”].)

prior sentencing hearing and explained “I do not feel I need to reiterate that”

2. *The trial court improperly imposed a fourth prior serious felony conviction enhancement*

Upon resentencing, the trial court appears to have added four five-year prior serious felony conviction enhancements to defendant’s sentence pursuant to section 667, subdivision (a)(1). The transcript of the resentencing hearing reveals the five-year enhancements were imposed on each of counts four through six (the forced oral copulation counts of conviction), as well as count eight (the pandering by procuring charge), where the court stated it was imposing “eight years concurrent, plus another five-year prior.” The minute order for the sentencing hearing, however, states the fourth section 667, subdivision (a)(1) enhancement was imposed in connection with count two, i.e., defendant’s pimping a minor over the age of 16 conviction.

Defendant’s supplemental brief on remand treats the minute order as controlling, but that does not square with controlling authority that holds the oral pronouncement is what controls (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2). We therefore understand defendant’s argument as a challenge to the section 667, subdivision (a)(1) enhancement imposed on the pandering by procuring charge in count eight, rather than the pimping a minor over the age of 16 conviction in count two.¹⁷

¹⁷ Defendant does not challenge the trial court’s imposition of three section 667, subdivision (a)(1) enhancements for the forced oral copulation convictions. We therefore do not address that aspect of the trial court’s sentence. (See generally §§ 667.6, subd. (d), 1170.1, subd. (h).)

A court may impose a section 667, subdivision (a)(1) enhancement only in connection with a count of conviction that is itself a serious felony. (§ 667, subd. (a)(1) [“Any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately”]; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1563 [no section 667, subdivision (a)(1) enhancement could be imposed in connection with a count of conviction that was not a serious felony as defined in section 1192.7]. The pandering by procuring charge in count eight, a violation of section 266i, subdivision (a)(1), is not among the list of serious felonies in section 1192.7. (§ 1192.7, subd. (c).) The five-year enhancement imposed in connection with count eight must therefore be stricken.

3. *The trial court should have the opportunity to consider exercising its discretion to strike one or more of the remaining section 667, subdivision (a)(1) enhancements*

At the time when defendant was resentenced, imposition of a section 667, subdivision (a)(1) enhancement was mandatory. (Former § 1385, subd. (b) [“This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667”].) A recent legislative change, however, deletes the provision of section 1385 that makes imposition of a section 667 prior serious felony conviction enhancement mandatory (and related language in section 667 itself), thereby permitting trial courts to strike

such enhancements when found to be in the interest of justice. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) §§ 1, 2.)

All concerned agree that the change in law worked by Senate Bill 1393 applies retroactively to defendant under the principles espoused in *People v. Francis* (1969) 71 Cal.2d 66 and *In re Estrada* (1965) 63 Cal.2d 740. The Attorney General further concedes, with Senate Bill 1393 now having taken effect, that “the trial court may exercise its newly enacted discretion.” We agree a remand to allow the trial court to consider exercising its section 1385 discretion as to one or more of the section 667, subdivision (a)(1) enhancements is warranted. (*People v. Rocha* (2019) 32 Cal.App.5th 352, 360.)

4. *The Abstract of Judgment should be amended
to reflect the proper conviction in count eight*

Defendant and the Attorney General both note the amended abstract of judgment erroneously reflects defendant was convicted in count eight of pandering by procuring in violation of section 288i, subdivision (a)(1). The correct statute of conviction is section 266i, subdivision (a)(1). We trust this will be corrected upon remand.

DISPOSITION

Defendant's convictions are affirmed. Defendant's sentence is reversed and the cause is remanded for resentencing consistent with this opinion. The trial court is to personally supervise the preparation of a corrected abstract of judgment following resentencing. The corrected abstract shall thereafter be delivered to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.